IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.35 OF 2004

Cintamani Jinappa Magdum
(since deceased by his LRs.)
1. Wajwalkumar Chintamani Magdum & ors. ... Appellants.
Versus.
Ashok Bhau Magdum & others. ... Respondents.

Shri N.J.Patil for the Appellants.

Shri Nitin Jamdar with Shri Vijay Killedar for the
Respondents Nos.1 to 3.

CORAM : ABHAY S. OKA, J.

DATED : 3rd February, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Appellants are the original Plaintiffs. The Appellants filed a suit simplicitor for perpetual injunction which was decreed by the trial Court. The Appellate Court has reversed the decree and dismissed the suit. It is not in dispute that the suit property was originally owned by Anant who died leaving behind him four sons. The sale deed in favour of the Appellants has been executed by only two sons of Anant. The case of the Appellants is that there was a partition effected between the four brothers and the suit land was allotted to the share of the vendors of the Appellants. The trial Court accepted the case of partition and therefore, proceeded to pass decree for perpetual injunction.

2. The Appellate court recorded a finding of fact that the Appellants failed to prove that there was a partition between the four sons of Anant. The Appellate Court relied upon the oral evidence and the recital in the sale deed executed in favour of the Appellants.

3. Shri Patil, the learned Counsel appearing for the Appellants had invited my attention to the finding of the trial Court on the aspect of partition. The trial Court has relied upon the entries in the Revenue records. Shri Patil relied upon the finding recorded by the trial Court in paragraph 12 of the Judgment. On the face of it, the said finding is not an express finding recording that there was a partition by metes and bounds and that the suit land was allotted to the share of the vendors of the Appellants. The recitals in the sale deed executed in favour of the Appellants itself show that the vendors of the Appellants purported to sell their undivided share. In this view of the matter, I find no fault with the finding recorded by the Appellate Court.

4. Shri Patil submitted that the possession of the Appellant has been protected by all along during the pendency of the proceedings and therefore, the said arrangement cannot be disturbed. He submitted that it is for the Respondents to file a suit for partition.

5. The suit for perpetual injunction filed by the Appellants proceeds on the assumption that there was a partition and the suit land was in exclusive possession of vendors of the Appellants. If the factum of partition is not proved, they cannot be in exclusive possession and therefore, they are not entitled to the perpetual injunction.

6. No substantial question of law arises in the Second Appeal. The same is accordingly dismissed with no order as to costs.

Judge.